

COMMENTARIES
ON THE
LAWS OF ENGLAND:
IN FOUR BOOKS;

WITH
AN ANALYSIS OF THE WORK

BY
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ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

IN TWO VOLUMES,

FROM THE NINETEENTH LONDON EDITION.

WITH A
LIFE OF THE AUTHOR. AND NOTES:

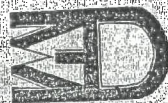
BY
CHRISTIAN, CHITTY, LEE, HOVENDEN, AND RYLAND,

AND ALSO

REFERENCES TO AMERICAN CASES.

BY A MEMBER OF THE NEW-YORK BAR.

VOL. I.—BOOK I. & II.



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yet, was still more distinguished as a scholar, statesman, and philosopher, must have considerable weight on such a subject. His prefatory discourse to his translation of the speeches of Isæus has the following passage. (4 vol. quarto ed. p. 34. 9 vol. octavo ed. p. 50.)

"I shall not easily be induced to wish for a change in our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analysing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity, to the court or the jury; it is reducible to the strictest rules of pure dialectics, and if it were scientifically taught in our public seminaries of learning,

would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding, as effectually as the famed peripatetic system; which, how ingenious and subtile soever, is not so honourable, so laughable, or so profitable, as the science in which Littleton exhorts his sons to employ their courage and care. It may unquestionably be perverted to very bad purposes, but so may the noblest arts; and even eloquence itself, which many virtuous men have for that reason decried. There is no fear, however, that either the contracted fist, as Zeno used to call it, or expanded palm, can do any real mischief, while their blows are directed and restrained by the superintending power of a court."

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws, more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal *nutrition, digestion, secretion, and all other branches of [*39] vital economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general signification of law, a rule of action dictated by some superior being; and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But

their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, [*42] and the blindness of human reason, *hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its [*43] moral guilt, or *superadd any fresh obligation, *in foro conscientiae*, to abstain from its perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law,

the children of a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; it could only

be declared void by the high authority by which it was ordained. The learned judge himself is also of this opinion in p. 91.—CH

or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature (4), and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject (b), is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called “the law of nations,” which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the civil law (c) very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium*.

*Thus much I thought it necessary to premise concerning the [*44] law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations, are governed; being thus defined by Justinian, (d) “*jus civile est quod quisque sibi populus constituit*.” I call it municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.” (5) Let us endeavour to explain

(b) Puffendorf, l. 7, c. 1. compared with Barbeyrac's Commentary.

(c) *Ff. l. 1. § 9.*

(d) *Inst. l. 1. § 1.*

(4) The law of nature, or morality, which teaches the duty towards one's neighbour, would scarce be wanted in a solitary state, where man is unconnected with man. A state of nature, to which the laws of nature, or of morals, more particularly refer, must signify the state of men, when they associate together previous to, or independent of, the institutions of regular government. The ideal equality of men in such a state no more precludes the idea of a law, than the supposed equality of subjects in a republic. The superior, who would prescribe and enforce the law in a state of nature, would be the collective force of the wise

and good, as the superior in a perfect republic is a majority of the people, or the power to which the majority delegate their authority.—CH.

(5) Though the learned judge treats this as a favourite definition; yet, when it is examined, it will not perhaps appear so satisfactory as the definition of civil or municipal law, or the law of the land, cited above from Justinian's Institutes, viz. *Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis*.

A municipal law is completely expressed by